

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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Refer Reply To:

CC:FIP:B01

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Date:

February 20, 2008

### Legend

Fund A =

Fund B =

Fund C =

Fund D =

Fund E =

Fund F =

Fund G =

Fund H =

Fund I =

Fund J =

Fund K =

Fund L =

Trust =

State A =

State B =

Accountant =

Manager =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Month 1 =

Month 2 =

Month 3 =

Year 1 =

Dear :

This is in reply to a letter requesting a ruling on behalf of Fund A, Fund B, Fund C, Fund D, Fund E, Fund F, Fund G, Fund H, Fund I, Fund J, Fund K and Fund L (collectively referred to as "Funds"). You have requested a ruling that Funds be granted an extension of time under § 301.9100 of the Procedure and Administration Regulations

to make an election under § 855(a) of the Internal Revenue Code for the tax year ended Date 1.

## **FACTS**

Funds are series funds of Trust, a State A business trust. Funds are registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., as amended, and their principal office is in State B. Funds have elected to be taxed as regulated investment companies (RICs) under subchapter M, part I, of Chapter 1 of the Internal Revenue Code.

Funds have elected annually to apply the provisions of § 855. Funds represent that the amounts subject to the election under § 855 were calculated and disclosed by Funds' officers to Funds' trustees and shareholders before the time prescribed for the filing of income tax returns by Funds for the taxable year ended Date 1. In addition, the dividends were in fact declared and paid by the Funds' officers in Month 1, Month 2, and Month 3 of Year 1.

It was the intent of Funds to file Forms 7004, Application for Automatic 6-Month Extension of Time to File Certain Business Income Tax, Information, and Other Returns, to extend the due date of Funds' Forms 1120-RIC, U.S. Income Tax Return for Regulated Investment Companies.

Funds' tax preparer, Accountant, was engaged to prepare required extensions and transmit them to Manager as Investment Manager to Funds, for review and filing with the taxing authorities. The employee of Accountant who normally prepared the Forms 7004 was on paternity leave. As a result, the preparation of the Forms 7004 was overlooked and the time for filing the Forms 7004 expired.

Accountant discovered the failure to file the Forms 7004 on Date 2 and notified Funds that day. The Forms 7004 were prepared by Accountant and filed by Funds on Date 3. As of Date 4, Funds have not been notified that the Forms 7004 have been accepted or rejected.

Funds make the following additional representations:

1. The request for relief was filed by Funds before the failure to make the regulatory election was discovered by the Service.
2. Granting the relief requested will not place Funds in a better tax position than if the elections had not been made on a timely basis.
3. Funds did not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under § 6662 of the Code at

the time Funds requested relief and the new position requires or permits a regulatory election for which relief is requested

4. Being fully informed of the required regulatory election and related tax consequences, Funds did not choose to not file the election.

## **LAW AND ANALYSIS**

Section 855(a) provides, in part, that if a RIC declares a dividend prior to the time prescribed by law for the filing of its return for a tax year (including the period of any extension of time granted for filing such return), and distributes the amount of the dividend to shareholders in the 12-month period following the close of such tax year and not later than the date of the first regular dividend payment made after the declaration, the amount so declared and distributed shall, to the extent the RIC elects in such return in accordance with regulations prescribed by the Secretary, be considered as having been paid during such tax year, except as provided otherwise by § 855.

Any distribution made from income and gains of the previous year made no later than the first distribution from income and gains of the current tax year is not considered the “first regular dividend payment” under § 855(a). Rev. Rul. 69-445, 1969-2 C.B. 148. In addition, Rev. Rul. 76-328, 1976-2 C.B. 216, holds that the “first regular dividend payment” under § 858(a) is the first dividend payment which exceeds the remaining undistributed earnings and profits of the previous year or for which no election under § 858(a) was made. The language of § 858(a), applying to real estate investment trusts, parallels the language of § 855(a).

Section 1.855-1(b)(1) of the Income Tax Regulations provides that a § 855(a) election must be made in the return filed by the RIC for the tax year.

Section 301.9100-1(c) provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Sections 301.9100-3(a) through (c)(1)(i) set forth rules that the Internal Revenue Service generally will use to determine whether, under the facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered

by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) provides that the interests of the government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

## **CONCLUSION**

Based on the facts and representations submitted, we conclude that Funds have satisfied the requirements for our granting a reasonable extension of time to allow them to make the election under § 855(a). Accordingly, Funds are granted an extension of time to make the election under § 855(a) on the federal income tax return filed for the tax year ended Date 1.

This ruling is limited to providing an extension of time for filing a § 855(a) election and does not provide relief from any liability incurred as a result of filing a late return. Except as specifically ruled upon herein, we express no opinion concerning any federal excise or income tax consequences relating to the facts herein under any other section of the Code. For example, we express no opinion as to whether Funds, in fact, have satisfied all of the requirements of § 855 and the regulations thereunder. We also express no opinion as to whether Funds qualify as RICs under subchapter M, part I, of Chapter 1 of the Code.

Further, no opinion is expressed as to whether Funds' tax liability is not lower in the aggregate for the year to which the regulatory election applies than Funds' tax liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the federal income tax return involved, the district director's office will determine Funds' tax liabilities for the years involved. If the district director's office determines any of Funds' liabilities are lower, that office will determine the federal income tax effect.

This ruling is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

Elizabeth A. Handler  
Elizabeth A. Handler  
Chief, Branch 1  
Office of Associate Chief Counsel  
(Financial Institutions & Products)